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NO. 903

IN THE

Supreme Court of the United States

October Term, 1964

ROSS BIGGERS, ET AL., *Petitioners*

v.

CITY OF HOUSTON, *Respondent*

BRIEF OF RESPONDENT, CITY OF HOUSTON, In Opposition To Petition For Writ Of Certiorari

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INDEX

	Page
Questions Presented	1
Statement	2
Argument	5
I. Jurisdiction	5
II. Right to Dismiss Condemnation Suit	9
III. Threat of Condemnation	15
IV. Civic Center Ordinance	17
Prayer	21
Certificate of Service	21

LIST OF AUTHORITIES

CASES	Page
Armendaiz v. Ray, 215 S.W.2d 210 (Tex.Civ. App. 1948)	10
Baaken v. State, 382 P.2d 550 (Mont.Sup. 1963)	20
Barnidge v. United States, 101 F.2d 295 (C.C.A. 8, 1939)	10, 11, 14
Beistline v. City of San Diego, 256 F.2d 421 (C.C.A. 9, 1958, Cert. Den. 358 U.S. 865, 79 S.Ct. 96 [1958])	18
Board of Regents of State Teachers College v. Kelley, 208 S.W.2d 565 (Tex.Civ.App. 1948)	10
Brazos River Conservation & Reclamation Dist. v. Allen, 141 Tex. 208, 171 S.W.2d 842 (Tex.Sup. 1943)	10, 11,13, 14
Brazos River Conservation & Reclamation Dist. v. Harmon, 178 S.W.2d 281 (Tex.Civ.App. 1944, err.ref. w.m.)	10

CASES	Page
Casey v. State, 331 S.W.2d 950 (Tex.Civ.App. 1959)	11, 12
Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E. 2d 790 (Ill. Sup. 1961)	20
Commercial Station Post Office v. United States, 48 F.2d 183, (C.C.A. 8, 1931)	15
Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231 (1939)	10, 18
Dewey v. City of Des Moines, 173 U.S. 193, 19 S.Ct. 379 (1899)	5
Eckhoff v. Forest Preserve Dist., 36 N.E. 2d 245 (Ill. Sup. 1941)	20
Ellis v. City of West University Place, 141 Tex. 608, 175 S.W.2d 396 (Tex.Sup. 1943)	21
General Finance Corp. v. Archetto, 176 A. 2d 73 (R.I. Sup. 1961)	20
Gov't of the Virgin Islands v. 50.05 Acres of Land, 185 F.Supp. 495 (D.C. Virgin Islands, 1960)	16
Hamer v. State Highway Commission of Missouri, 304 S.W.2d 869 (Mo.Sup.Div. 2, 1957)	20
Harrell v. City of Denton, 116 S.W.2d 423 (Tex. Civ.App. 1938)	10
Houston Pipe Line Co. v. Brown, 361 S.W.2d 884 (Tex.Civ.App. 1962, error ref. n.r.e.)	10, 12
In Re City of Pittsburgh, 90 Atl. 329 (Penn.Sup. 1914)	20
Kirschke v. City of Houston, 330 S.W.2d 629 (Tex.Civ.App. Houston, 1959, error ref. n.r.e., cert. den. 364 U.S. 474, 81 S.Ct. 242)	6, 18, 19, 21
Leonard v. Small, 28 S.W.2d 826 (Tex.Civ.App. 1939, error ref.)	10
L-M-S Inc. v. Blackwell, 149 Tex. 348, 233 S.W. 2d 286 (Tex.Sup. 1950)	20
Lower Nueces River Water Supply Dist. v. Cartwright, 160 Tex. 239, 328 S.W.2d 752 (Tex.Sup. 1959)	10, 14
Moody v. Wickard, 136 F.2d 801 (Ct.App. D.C. 1943)	15

CASES	Page
Moser v. City of Phoenix, 7 P.2d 622, 627 (Ariz. Sup. 1932)	20
Nehoc Land Co. v. City of Houston, 342 S.W.2d 42 (Tex.Civ.App. 1961, err. ref. n.r.e.)	10
Peabody v. United States, 231 U.S. 530, 34 S.Ct. 159 (1913)	16
Rook v. McCulloch County, 326 S.W.2d 603 (Tex. Civ.App. 1959)	10
Ruddock v. American Medical Ass'n, 112 N.E.2d 107 (Ill.Sup. 1953)	20
Sorbino v. New Brunswick, 129 A.2d 473 (N.J. Super. 1957)	20
State v. Appleton, 294 N.W. 418 (Minn.Sup. 1940)	20
State v. Delesdenier, 7 Tex. 76 (Tex.Sup. 1851)	16
State v. Vaughan, 319 S.W.2d 349 (Tex.Civ.App. 1958)	16, 17
Thompson v. Janes, 151 Tex. 495, 251 S.W.2d 953 (Tex.Sup. 1952)	10, 11, 12
Tillman v. District of Columbia, 29 F.2d 442 (Ct. App. D.C. 1928)	20, 21
Twenty-Three Tracts of Land, etc. v. United States, 177 F.2d 967 (C.C.A. 6th, 1949)	10, 20
United States v. Sponenberger, 308 U.S. 256 (1939)	20
Williamson v. Hopewell Redevelopment & Housing Authority, 371 U.S. 234, 83 S.Ct. 315 (1963)	7, 8
Willink v. United States, 240 U.S. 572 (1916)	20

TEXTS AND MISCELLANEOUS	
18 American Jurisprudence 771 (Em.Dom. #144)	20
18 American Jurisprudence 1012-1016 (Em.Dom. #370-#372)	11
30 Corpus Juris Secundum 6-19 (Em.Dom. #335-#342)	11
63 Corpus Juris Secundum 37 (Mun.Corp. #749)	20
Nichols, The Law of Eminent Domain, 3rd Ed., Vol. VI, Pg. 189, Section #26.42	11
121 A.L.R. 12	11

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BRIEF OF RESPONDENT, CITY OF HOUSTON, In Opposition To Petition For Writ Of Certiorari

The Respondent, City of Houston, files this opposition to the Petition for Writ of Certiorari filed by Petitioners to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTIONS PRESENTED

Questions presented for determination here are:

(1) Should the Supreme Court of the United States review this condemnation case involving only matters of state law and where no federal question is involved and where no federal question was ever raised in the state courts?

(2) Where the condemning authority has never physically entered on landowner's property, nor fulfilled the conditions of state law requisite to entry on the property, does such condemning authority have a right to abandon and dismiss condemnation proceedings, after jury verdict and prior to entry of final judgment, where its governing body finds and determines that the sum of the jury verdict exceeds the benefit to the public that would result from the acquisition of said tract by the condemning authority?

(3) Assuming it otherwise has the power to dismiss a condemnation proceeding, does the threat of condemnation, and/or the uncertainty created in the landowner's mind as to whether a property is to be condemned or not, constitutes a "point of no return", i.e., such a "taking" of the property, or such "prejudice" to the landowner, as to preclude a condemning authority from dismissing its condemnation suit?

(4) A city ordinance delineated the geographic limits of a proposed civic center and also attempted to prevent the erection of new buildings within those limits and to regulate the repairs on existing buildings. If the governing body of the said city determined that the price set thereon by the jury in a condemnation suit exceeded the benefit to the public that would result from the acquisition of a tract of land within those delineated limits; and, assuming it otherwise had the power to dismiss, would the existence of this ordinance prevent a condemning authority from amending the ordinance to exclude said land and to dismiss the condemnation suit?

STATEMENT

On the 23rd day of September, 1958, the City Council of the City of Houston, by Ordinance No. 58-1033, delineated

the boundaries of the proposed Civic Center (S.F. pg. 3, L 19-25; Pg. 4, L 1-3; Tr. 109-112). It is uncontroverted that the 128,520 square feet of land belonging to Petitioners, which is the subject matter of this controversy, is included within the boundaries, and abutting the western border thereof, of the proposed Civic Center as shown by said Ordinance No. 58-1033.

Prior to 1961, the subject property (land and improvements) had been assessed by the City for ad valorem taxes for $6,950, and in that year the assessment was raised to $217,000 (S.F. Bk. 5, Pg. 14, L 7-22; S.F. Bk. 6, Pg. 5).

On the 3rd day of April 1962, Respondent filed its Statement or Petition in condemnation, seeking to condemn subject property for the Civic Center (Tr. Pg. 3-7).

The Award of the Special Commissioners in condemnation was filed July 6, 1962 (Tr. Pg. 9-13), and was duly and timely objected to by Petitioners (Tr. Pg. 15). At no time was the amount of the Award of the Special Commissioners deposited into the Registry of the Court (S.F. Bk. 6, Pg. 4, L 4-9), nor was said amount ever paid to Petitioners in person (S.F. Bk. 6, Pg. 28, L 17-21). It is also uncontroverted that the City of Houston has never taken physical possession of, or trespassed on, subject property (S.F. Bk. 6, Pg. 34, L 2-8).

Objections to the Award having been filed, a trial by jury in the County Civil Court at Law No. Two, Harris County, Texas, commenced on March 26, 1963, and ended on March 29, 1963 (S.F. Pg. 1; Tr. Pg. 29).

To the jury, Petitioner Ross Biggers, further testified that he thought subject property was worth $10 per square foot [which would be $1,285,200], but that he would rather

keep the property than get $10 per square foot for it (S.F. Pg. 240, L 2-13).

The jury verdict for $1,157,615, which was $127,585 less than Petitioner swore it was worth, was rendered on Friday, March 29, 1963 (Tr. Pg. 29). On the following Wednesday, April 3, 1963, the City Council of the City of Houston, by Motion No. 63-1238, authorized the City Attorney to "Dismiss this suit as soon as possible in order that the motion to dismiss may be filed prior to entry of final judgment herein, *and to prepare an ordinance eliminating this property from the Civic Center.*" (S.F. Bk. 5, Pg. 57A) (Emphasis Added).

On Thursday, April 4, 1963, at 9:15 a.m., Respondent filed its Motion to Dismiss the Condemnation Proceeding (Tr. Pg. 31-32).

On April 17, 1963, the City Council of the City of Houston passed Ordinance No. 63-544 eliminating the subject property from the Civic Center (S.F. Bk. 5, Pg. 57B), said ordinance, at Section 1 thereof, found: "The City Council finds and determines that the sum of $1,157,615 exceeds the benefit to the public that would result from the acquisition of said tract by the City of Houston."

On April 19, 1963, Respondent filed its First Amended Motion to Dismiss (Tr. Pg. 33-40), and Petitioners filed their Motion Contesting the right of Respondent to dismiss (Tr. Pg. 105-113). A hearing was held thereon on April 19, 1963, at which hearing evidence was adduced (S.F. Bk. 5).

At the conclusion of the hearing the Court rendered a judgment on the verdict (Tr. Pg. 41-48), but continued the hearing on the Motions to dismiss until April 26, 1963 (S.F. Bk. 6, Pg. 2).

On April 26, 1963, the Court again heard evidence on the matter (S.F. Bk. 6); and after hearing testimony, the Court on April 26, 1963, overruled Plaintiff's Motion to Dismiss, First Amended Motion to Dismiss, and Motion to Set Aside Judgment and Enter Judgment of Dismissal, to all of which Respondent objected, excepted, and gave notice of appeal (Tr. 59-60).

It is uncontested, and Petitioners so state in their Application for Writ of Error to the Supreme Court of Texas, that Petitioners are continuing to operate their printing business on subject property as they have always done.

There was no testimony, nor could there be, of any projected public work or building, either proposed or being constructed, which would make the acquisition of subject property mandatory.

ARGUMENT

I.

JURISDICTION

This was a condemnation proceeding under the provisions of Title 52, Vernon's Civil Statutes, Texas, which governs practically all Texas condemnation procedure. The Petitioners are long-time prominent residents of the City of Houston and there is no question of diversity of citizenship. Nor, at any time in these proceedings until now, has a federal question been raised or passed on, directly or by implication.

The case of *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899) enunciated what Respondent believes to be the established law with regard to jurisdiction of the Supreme Court of the United States in a certiorari proceeding to review the action of a state court:

> "In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States." ***
>
> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it . . . a point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it."

The Court's attention is called to the recent case of *Kirschke v. City of Houston*, 364 U.S. 474, 81 S.Ct. 242 (1960). This case involved the refusal of the City of Houston to issue Kirschke a building permit. Kirschke filed suit in the proper Texas District Court seeking monetary damages. He claimed, inter alia, as Petitioners do in the case at bar, that the refusal of the building permit constituted a "taking" of his property contrary to the laws of the State of Texas and the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The Texas Court of Civil Appeals in *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex.Civ.App. 1959), had held:

> "Indeed, nothing has been done of a physical or tangible nature to Appellants' property or in connection with any other property in the area that could in any way interfere with Appellants' use of their property *in its present state*." (Emphasis added)

And,

> "Appellants insist . . . that the wrongful exercise of the police power in this case has resulted in the taking or damaging of their property . . . The answer to their contention is that the action of the City has not pro-

> gressed to the point where there has been any taking or damaging of property within the purview of either the State or Federal Constitutions, *since up to this time the City has merely refused to grant a building permit.*" (Emphasis added).

And,

> "In the instant case *the denial of the building permit did not constitute a taking or damage* to Appellants' property *although* it was *denied in the anticipation* that at *some uncertain future date steps might be taken under the right of eminent domain* that would amount to a taking of their property or damage thereto." (Emphasis added).

The Supreme Court of Texas refused a writ of error, stating the Court of Civil Appeals had committed no reversible error.

The Supreme Court of the United States, 364 U.S. 474, 81 S.Ct. 242, dismissed the appeal

> "for the reason that the judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a non-federal ground adequate to support it."

Here, it might be pointed out, Petitioners are not as far along as Kirschke, for they never applied for a building permit. (S.F. Bk. 5, Pg. 53, L 8-20; S.F. Bk. 6, Pg. 33, L 16-33; Bk. 6, Pg. 34, L 1).

The Texas Court of Civil Appeals also pointed out that Kirschke's remedy was by mandamus or injunction, not a suit for damages in what would practically amount to an inverse condemnation.

The Court's attention is also called to *Williamson v. Hopewell Redevelopment and Housing Authority*, 371

U.S. 234, 83 S.Ct. 315 (1963), wherein the Supreme Court of the United States held that a Virginia Supreme Court decision concerning adequacy of notice in a condemnation case did not present "a substantial federal question".

Nor is there any equitable situation here presented violative of any rights of Petitioners. Indeed, *before the jury*, Petitioner, Ross Biggers swore his property was worth $1,285,200, and, further that he would rather keep his property than get that price for it. The jury verdict of $1,157,615, was $127,385 *less* than the amount Petitioner Ross Biggers testified under oath the property was worth. As he deposed he would rather have his property than even to have what he said it was worth, surely his constitutional rights would not be violated by acceding to his wishes and allowing him to keep his property instead of expropriating it for an amount $127,385 less than he swore it was worth!

"Q. (Mr. White) Do you, Mr. Biggers, do you have any opinion as to whether or not if you were permitted to put your land on the market today and sell it you could get $10 a square foot for it? ($10 a square foot being $1,285,200, or $127,385 *more* than the ultimate jury verdict).
"A. (Mr. Biggers) I feel confident that we can.
"Q. If you had your choice would you rather have it to put on the market?
"A. I would rather keep it.
"Q. Would you rather take $10 a square foot for it or would you rather have it and put it on the market, Mr. Biggers?
"A. I would rather keep the land. May I say why?"
(S.F. Pg. 240, L 2-13, parenthetical matter added).

* * *

"Q. And if you had your rathers, you would rather keep it and put it on the market and sell it, is that right?
"A. Yes, sir, I would rather keep it."
(S.F. Pg. 241, L 5-9).

Nor, it is submitted, has the Respondent, in its ad valorem taxation, violated any of Petitioners' constitutional rights. Prior to 1961, the subject property (land and improvements) had been assessed by the City of Houston for ad valorem taxes for $6,950, and in that year the assessment was raised to $217,000. (S.F. Bk. 5, Pg. 14, L 7-22; S.F. Bk. 6, Pg. 5). Although the raise was substantial in relation to its former assessment for only $6,950, *the new assessment of $217,000 was still $1,068,200 less than Petitioner swore the property was worth.* Surely this does not violate any of his constitutional guarancies. In any event, State law offered him remedies for review of his assessment. Petitioner elected not to avail himself of these remedies.

Hence, Respondent submits that the Supreme Court of the United States should not entertain this Petition for Writ of Certiorari because not only were no federal questions *raised* in the state courts, but there *are* none.

II.

RIGHT TO DISMISS CONDEMNATION SUIT

Assuming, arguendo, Petitioners have satisfied the insurmountable jurisdictional question, it has long been recognized that a condemning authority may dismiss the condemnation proceedings in the event it feels that the price set upon the land sought to be condemned by the jury ex-

ceeds the benefit to the public to be derived from the ownership of said land.

> "Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost." *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 236 (1939).
>
> Also: *Twenty-Three Tracts of Land v. United States*, 177 F.2d 967 (C.C.A. 6, 1949); *Barnidge v. United States*, 101 F.2d 295 (C.C.A. 8, 1939);

This is the Texas rule also: *Brazos River Conservation & Reclamation Dist. v. Allen*, 141 Tex. 208, 171 S.W.2d 842; *Thompson v. Janes*, 151 Tex. 495, 251 S.W.2d 953 (1952); *Lower Nueces River Water Supply Dist. v. Cartwright*, 160 Tex. 239, 328 S.W.2d 752 (1959); *Leonard v. Small*, 28 S.W.2d 826 (Tex.Civ.App. 1939, error ref.); *Harrell v. City of Denton*, 116 S.W.2d 423 (Tex.Civ.App. 1938); *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281 (Tex.Civ.App. 1944, error ref. w.m.); *Board of Regents of State Teachers College v. Kelley*, 208 S.W.2d 565 (Tex.Civ.App. 1948); *Armendaiz v. Ray*, 215 S.W.2d 210 (Tex.Civ.App. 1948); *Rook v. McCulloch County*, 326 S.W.2d 603 (Tex.Civ.App. 1959); *Neboc Land Co. v. City of Houston*, 342 S.W.2d 42 (Tex. Civ.App. 1961, error ref. n.r.e.); *Houston Pipe Line Co. v. Brown*, 361 S.W.2d 884 (Tex.Civ.App. 1962, error ref. n.r.e.).

And this is the majority rule in the United States:

18 Am.Jur. 1012-1016 (Em. Dom. #370-#372);
30 C. J. S. 6-19 (Em. Dom. #335-#342).

Nichols, *The Law of Eminent Domain*, 3rd Ed., Vol. VI, Pg. 189, Sect. #26.42.

See: Collation of Authorities, 121 A.L.R. 12, et seq.

There are circumstances, however, where this right may be forfeited. In *Barnidge v. United States*, 101 F.2d 295, 298, (C.C.A. 8, 1939), the federal rule was stated:

> "In fact, it has been held quite generally that where, as here, *possession of the property is not taken* at or prior to the institution of condemnation proceedings, the proceedings may be abandoned at any time before the actual acceptance of the property and payment therefor." (Emphasis added).

Texas, also, recognizes this limitation. The only reported Texas cases wherein the denial of dismissal was upheld are:

Brazos River Conservation & Reclamation District v. Allen, 141 Tex. 208, 171 S.W.2d 842 (Tex.Sup. 1943); *Thompson v. Janes*, 151 Tex. 495, 251 S.W.2d 953 (Tex. Sup. 1952); and *Casey v. State*, 331 S.W.2d 950 (Tex.Civ. App. 1959).

In *Thompson v. Janes*, supra, the Texas Supreme Court held, at page 955 (251 S.W.2d):

> ". . . petitioner acquired possession of the four acres at the outset of the suit under an agreement with respondents and has not offered to return possession to them . . . As a condition precedent to petitioner's right to dismissal, he must restore the status quo by

surrendering to respondents possession of the land sought to be dismissed . . .".

In *Casey v. State*, supra, it was held, at page 952 (331 S.W.2d):

> "Appellee . . . does not deny it had already taken possession of the property and constructed the highway thereon . . . the right to abandon the project of taking property in a condemnation case may be lost by taking possession of the property, which unquestionably was done in this case . . ."

Thus, it is held in the above two cases that the right of abandonment may be lost where possession is not relinquished by the condemnor and the status quo re-established.

Anent the restoration of the status quo, the Court is is referred to the very recent case of *Houston Pipe Line Co. v. Brown*, 361 S.W.2d 884 (Tex.Civ.App. 1962, error ref. n.r.e.), where a public utility with the right of eminent domain had trespassed on Brown's property. When Brown sought to enjoin, the utility filed a cross-action for condemnation as it was allowed to do under Article 3269, Vernon's Civil Statutes, Texas. The utility company considered the verdict excessive and offered to dig up its pipeline and restore the land to the condition it was in prior to the trespass. The Texas Court of Civil Appeals allowed the utility company so to do, holding, at page 884 (361 S.W.2d):

> "In the instant case *appellant did not take possession under or by virtue of the condemnation proceedings*, and it does not seek to relitigate the matter of damages. *It has offered* to remove the pipeline from the

> premises in question and *to restore possession to appellees*, and to submit to a mandatory injunction requiring it to do so, . . . *It does not appear, therefore, that appellees will be prejudiced in any way* by the court granting them the relief they prayed for in their petition in seeking a mandatory injunction against appellant." (Emphasis added) 361 S.W.2d 884, 887.

The *Brown* case is especially significant to a proper analysis of the case at bar. It being conceded that Respondent did not take subject property "under and by virtue of the condemnation proceedings", any other "possession" or "taking" of subject property (which, of course, is denied) would be extra-legal and thus would invoke the doctrine of *Brown*.

The other Texas case in which the Appellate Courts upheld the action of the Trial Court in denying dismissal of a condemnation case was *Brazos River Conservation & Reclamation District v. Allen*, 141 Tex. 208, 171 S.W.2d 842 (Tex.Sup. 1943). It was held, at page 884:

> "A condemnor has the right to correct its errors, to dismiss its proceedings for condemnation, to abandon the purpose of taking the land, but it may not exercise any of these rights to the *prejudice* of the landowner." (Emphasis added).

Thus, we now have two conditions which would preclude the right to dismiss:

> (1) Where possession and the status quo cannot be restored -- not applicable in the case at bar; and
>
> (2) Where the landowner would be "prejudiced" by the dismissal.

Obviously, the word "prejudiced" as used in *Allen,* supra, must have a circumscribed meaning in law, otherwise no suit could ever be dismissed, as a fruitless trip to the courthouse could be considered "prejudice" (in its broadest sense) to the landowner.

This word, in the context here used, as well as the meaning of the *Allen* case, supra, was explained by the Texas Supreme Court in *Lower Nueces River Water Supply District v. Cartwright,* 160 Tex. 239, 328 S.W.2d 752 (1959), at Page 757, where the Court held:

> ". . . However, when the condemning authority *gains possession of land under and by virtue of condemnation proceedings* (Emphasis, the Court's) and cannot thereafter restore possession to the landowner and thus re-establish the status quo, such authority cannot dismiss the condemnation proceedings under which possession was obtained and seek to relitigate the matter of damages. Such action would result in obvious prejudice to the landowner . . . *This is the prejudice to the landowner upon which the rule of Brazos River Conservation & Reclamation District v. Allen . . . is based . . .*" (Emphasis added).

Here, Respondent did not gain possession of the land under a condemnation proceeding and under Texas law Petitioners would not be prejudiced by a dismissal. Also, as previously mentioned, there is no question about restoration of the status quo, as it has not been disturbed. Hence, it is submitted that under Texas law there would be no impediment to dismissal, and, further, that the Texas law does not do violence to the United States Constitution, *Barnidge v. United States,* supra. Indeed, the Texas rule may be more zealous of the landowners rights than the federal rule.

> "It is settled that *the government may take possession in advance* of passing of title or *of abandonment of the condemnation proceeding.*" (Emphasis added). *Commercial Station Post Office v. United States*, 48 F.2d 183, 185 (C.C.A. 8, 1931).
>
> Also: *Moody v. Wickard*, 136 F.2d 801 (Ct.App. D.C., 1943).

III.

THREAT OF CONDEMNATION

In their "Statement of the Case", pages 7-9 of their Petition for Writ of Certiorari, Petitioners referred to statements of various witnesses, including Petitioner, Ross Biggers, to the effect that the witnesses, or their undisclosed principals, had evinced an interest in the subject property but since it was under the threat of condemnation no deal was made. In passing it should be pointed out that the Texas Court of Civil Appeals which had the entire record in this case before it, stated:

> "It would be purely speculative to say that Appellees were deprived of any sale by interference with the right to negotiate—There is nothing to suggest an agreement would have probably been reached between Appellees and a prospective purchaser. In the absence of such, we are unable to see how any damage could be shown with any certainty. . ."
>
> (Page 48, Petition for Writ of Certiorari); 380 S.W.2d 705.

Notwithstanding, Petitioners ask that United States Supreme Court hold that the alleged facts constituted a "taking" of their property, and since it was thus "taken" a condemnation suit could not be dismissed.

The United States Supreme Court held in, *Peabody v. United States*, 231 U.S. 530, 34 S.Ct. 159 (1913):

> "*Land*, or an interest in land, *cannot be deemed to be taken* by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired, or *because of a depreciation in its value, due to the apprehension of such use.*" (Emphasis added).

That doctrine is still followed by the federal courts. In *Government of Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495, 498 (D.C. Virgin Islands, 1960) it was held:

> "The Court has not overlooked an additional objection made by certain defendants that under the statutory scheme for condemnation there has already been an uncompensated taking of property in this case. The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation action itself constitutes a taking. The court finds no merit in it."

A landmark Texas case, *State v. Delesdenier*, 7 Tex. 76 (Tex. Sup. 1851) stated that everyone held his property subject to the right of the state to condemn it. In *State v. Vaughan*, 319 S.W.2d 349 (Tex.Civ.App. 1958), it was held:

> "The mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate the property does not afford the owner the right to recover damages from the State because there

> has been neither a taking or any character of a physical invasion of the property. Indeed the condemnation may be completely abandoned and the property never taken . . . The loss of tenants and the resulting loss of rentals was, in any event, incidental or consequential to the taking of the entire property by the State for which reason the State is not liable for such consequential damage . . . Moreover prior to March 25, 1958, there is no showing of any physical invasion or appropriation of the property and therefore no prior taking shown . . .".

It is submitted, therefore, that the Sword of Damocles presented to Petitioners by the threat of condemnation was not a "taking" of their property in any sense, and certainly not a taking under the laws of eminent domain, hence the right to dismiss condemnation proceedings has not been forfeited thereby.

IV.

CIVIC CENTER ORDINANCE

Petitioners contend that Civic Center Ordinance No. 58-1033 was invalid and unconstitutional, but that, somehow, notwithstanding its invalidity and unconstitutionality, it "took" their property,—in effect worked an inverse condemnation,—and the property having been "taken" thereby, Respondents could not dismiss the condemnation suit.

Needless to say, none of the cases they rely on are in point or support this proposition—most of the cases are suits for mandamus to compel the issuance of a building permit or in injunction to prevent the enforcement of a restrictive ordinance. The Texas Court of Civil Appeals, in their opinion sought here to be reviewed, held

that, "If appellees had desired to do so (i.e. build) they had their remedy, in spite of the ordinance by mandamus." 380 S.W.2d 705, Petitioners' Petition for Writ of Certiorari, p. 48, L 1-2.

The federal courts have consistently held that the mere enactment of legislation preparatory to, or authorizing, condemnation, is not a "taking" of property:

In *Danforth v. United States*, 308 U.S. 271, 60 S.Ct. 231 (1939) the United States Supreme Court held:

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership — they cannot be considered as a 'taking' in the constitutional sense." 308 U.S. 286, 60 S.Ct. 237.
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> "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail."

In *Beistline v. City of San Diego*, 256 F.2d 421, [C.C.A. 9, 1958, Cert. Den. 358 U.S. 865, 79 S.Ct. 96 (1958)], the Ninth Circuit held:

> "The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property."

In *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. Civ.App. 1959, error ref. n.r.e., Cert. Den. 364 U.S. 474, 81 S.Ct. 242), the Texas Courts (and the United States

Supreme Court on Petition for Writ of Certiorari) had for consideration a case where the City of Houston had refused Plaintiff Kirschke a building permit. It should be noted, in passing, that even though Petitioners here had never even applied for a building permit, if they had done so, the most that could have happened would have been a denial of the permit and they would have been in the same situation as Kirschke.

Kirschke sued the City of Houston for damages allegedly resulting to him as a result of the denial of this permit, which, it was claimed, "took" his property contrary to the Texas Constitution and the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Although the term was not mentioned in words, the theory of the lawsuit was evidently in the nature of an inverse condemnation.

The Texas Court of Civil Appeals held that there was no "taking" in the constitutional sense because:

> "There had been no actual or partial taking of appellants' property, nor any physical invasion or appropriation thereof or physical damage thereto." 330 S.W.2d 632.
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> "Appellants insist, however, that the wrongful exercise of the police power in this case has resulted in the taking or damaging of their property, for which they should be permitted to recover adequate compensation. The answer to their contention is that the action of the City has not progressed to the point where there has been any taking or damaging of property within the purview of either the State or Federal constitutions, since up to this time the City has merely refused to grant a building permit." 330 S.W.2d 634.
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> * * * *

> "They were still free to make the desired improvements without a permit under the facts pleaded or to force the issuance of such permit. Instead of doing so, they waited for some time and then chose the wrong remedy." 330 S.W.2d 634.

Our sister states follow the federal and Texas rule holding that taking or damaging of land by eminent domain is not accomplished by passing of resolutions or ordinances in anticipation of future acquisition: *Eckhoff v. Forest Preserve Dist.*, 36 N.E.2d 245 (Ill. Sup. 1941); *In re City of Pittsburgh*, 90 Atl. 329 (Penn. Sup. 1914); *Hamer v. State Highway Commission of Missouri*, 304 S.W.2d 869 (Mo. Sup. Div. 2, 1957); *Scorbino v. New Brunswick*, 129 A.2d 473 (N.J. Super 1957); *United States v. Sponenberger*, 308 U.S. 256 (1939); *Willink v. United States*, 240 U.S. 572 (1916); *Chicago Housing Authority v. Lamar*, 172 N.E.2d 790 (Ill. Sup. 1961): *State v. Appleton*, 294 N.W. 418 (Minn. Sup. 1940); *23 Tracts of Land, etc. v. United States*, 177 F.2d 967 (C.C.A. 5th 1949); *General Finance Corp. v. Archetto*, 176 A.2d 73 (R.I. Sup. 1961); *Ruddock v. American Medical Assn.*, 112 N.E.2d 107 (Ill. Sup. 1953); *Baaken v. State*, 382 P.2d 550 (Mont. Sup. 1963); *Moser v. City of Phoenix*, 7 P.2d 622, 627 (Ariz. Sup. 1932); *18 Am. Jur.* 771 (Em. Dom. #144).

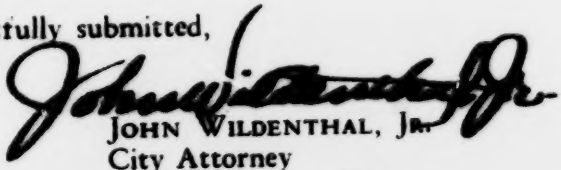
The ordinance is either valid or invalid. If it is valid, it is a proper use of legislative and police power for which Respondent, of course, would not be liable. 63 C.J.S. 37 (Mun. Corp. #749); *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 233 S.W.2d 286 (Tex.Sup. 1950).

If the ordinance is invalid, nonetheless its passage was a governmental act or function of Respondent City for which it is not liable in damages. *Tillman v. District of*

Columbia, 29 F.2d 442 (Ct.App. D.C. 1928); *Ellis v. City of West University Place*, 141 Tex. 608, 175 S.W.2d 396 (Tex.Sup. 1943); *Kirschke v. City of Houston*, supra, nor would it lose the valuable substantive right of dismissal of a condemnation suit thereby; for, it would be tantamount to collecting damages from Respondent to force an inverse condemnation upon it and require public tax moneys to be spent to pay a price for land its governing body considers excessive.

WHEREFORE, Respondent prays that Petitioners' Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent, City of Houston, in Oppcsition to Petition for Writ of Certiorari has been served upon Hon. Fentress Bracewell, and Hon. William H. White, Counsel for Petitioners, 1808 First City National Bank Building, Houston, Texas, 77002, by placing same in the United States mail, postage prepaid, on this 5 day of March, 1968.

JOHN WILDENTHAL, JR.
City Attorney
City of Houston

Attorney for Respondent